



Docket No.: KCC-15,891

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**THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Applicants: Daniel K. SCHIFFER
Steven R. STOPPER

Serial No.: 10/036,106

Group No.: 1771

Filing Date: 09 November 2001

Examiner: Peter Y. Choi

Title: BIODEGRADABLE BREATHABLE
FILM AND LAMINATE

Customer No.: 35844

**RESPONSE TO NOTIFICATION OF
NON-COMPLIANT APPEAL BRIEF**

Mail Stop Appeal Brief - Patents

Commissioner for Patents

P.O. Box 1450

Alexandria, Virginia 22313-1450

Dear Sir:

In response to the Notification of Non-Compliant Appeal Brief mailed 17 May 2007, Appellants have revised Section 3, Status of the Claims, on page 2 of the Supplemental Appeal Brief accompanying this Response to more explicitly comply with 37 CFR § 41.37(c)(1)(iii).

I hereby certify that this correspondence (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on

6-8-07

6-8-07

Date

Maxwell J. Petrus

Signature

Serial No.: 10/036,106

Docket No.: KC-15,891

Appellants believe that no fee is due at this time. However, if Appellants are mistaken and a fee is due, please charge any fees related to the Response To Notification of Non-Compliant Appeal Brief to Deposit Account 19-3550.

Respectfully submitted,



Maxell J. Petersen

Registration No. 32,772

Pauley Petersen & Erickson
2800 West Higgins Road
Suite 365
Hoffman Estates, Illinois 60169
Voice (847) 490-1400
FAX (847) 490-1403



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Applicants: Daniel K. SCHIFFER
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Title: BIODEGRADABLE BREATHABLE
FILM AND LAMINATE

Customer No.: 35844

SUPPLEMENTAL APPEAL BRIEF

Mail Stop Appeal Brief - Patents

Commissioner for Patents

P.O. Box 1450

Alexandria, Virginia 22313-1450

Dear Sir:

Applicants herewith file their Supplemental Appeal Brief in the above-identified case, in response to the 17 May 2007 Notification of Non-Compliant Appeal Brief. Please charge any additional amount owed, or credit any overpayment to Deposit Account 19-3550.

1. REAL PARTY IN INTEREST

The real party in interest is Kimberly-Clark Worldwide, Inc., the assignee of the present application (as recorded at reel 012783, frame 0635).

I hereby certify that this correspondence (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on

08 June 2007

08 June 2007

Date

Magell J. Peltz

Signature

2. RELATED APPEALS AND INTERFERENCES

Applicants are not aware of any related appeals or interferences with regard to the present application

3. STATUS OF CLAIMS

Claims 21-26, 31, 35, 37-54 and 56-58 are pending in the application. Claims 1-20, 27-30, 32-34, 36, 55 and 59-60 are canceled. The present Appeal is directed to Claims 21-26, 31, 35, 37-54 and 56-58, which were finally rejected in an Office Action mailed 08 December 2006.

4. STATUS OF AMENDMENTS

All Amendments filed thus far have been entered.

5. SUMMARY OF CLAIMED SUBJECT MATTER

The present invention is directed to a breathable outer cover laminate of a film and a nonwoven web, in which every film layer and the nonwoven web includes a biodegradable polymer. The laminate is useful as a biodegradable outer cover for disposable personal care absorbent garments and medical apparel.

In one embodiment, recited in independent Claim 21, the invention is directed to a breathable outer cover laminate comprising:

a breathable, stretch-thinned barrier film (11) having one or more layers (15, 22, 24) (Fig. 2 and page 13, line 20 – page 14, line 2);

one of the layers (15) including a mixture of filler particles (16) and a biodegradable thermoplastic polymer (12), having voids (14) formed around the filler particles (16) to facilitate passage of water vapor through the film, and constituting 50-100% of a thickness of the film (11) (Fig. 2, page 14, lines 1-4, page 15, lines 9-15);

each of the layers (15, 22, 24) including a biodegradable thermoplastic polymer (12) (Fig. 2, page 14, lines 1-5, page 15, lines 2-8);
and

a fibrous nonwoven web (40) continuously laminated face-to-face with the film (11) and including a biodegradable thermoplastic polymer (Figs. 3-4, page 17, lines 12-14, page 18, lines 2-3);

wherein the biodegradable thermoplastic polymers are selected from the group consisting of polylactic acid polymers; polyester terpolymers of butanediol, adipic or succinic acid, and terephthalic acid; polycaprolactone polymers; and combinations thereof (page 9, line 19 – page 10, line 4).

In another embodiment, recited in independent Claim 50, the invention is directed to a breathable outer cover laminate comprising:

a breathable, stretch-thinned barrier film (11) having two or more layers (15, 22, 24) (Fig. 2 and page 13, line 20 – page 14, line 2);

two of the layers (15, 24) being adjacent and each including a mixture of about 5-80% by weight filler particles (16) and about 20-95% by weight of a biodegradable thermoplastic polymer (12), having voids (14) formed around the filler particles (16), and together constituting 50-100% of a thickness of the film (11) (Fig. 2, page 14, lines 1-5, page 15, lines 2-8);

each of the layers (15, 22, 24) including a biodegradable thermoplastic polymer (12) (Fig. 2, page 14, lines 1-5, page 15, lines 2-8); and

a fibrous nonwoven web (40) continuously laminated face-to-face with the film (11) and including a biodegradable thermoplastic polymer (Figs. 3-4, page 17, lines 12-14, page 18, lines 2-3);

wherein the biodegradable thermoplastic polymers (12) are selected from the group consisting of polylactic acid polymers; polyester terpolymers of butanediol, adipic or succinic acid, and terephthalic acid; polycaprolactone polymers; and combinations thereof (page 9, line 19 – page 10, line 4).

In another embodiment, recited in independent Claim 53, the invention is directed to a breathable outer cover laminate comprising:

a breathable, stretch-thinned barrier film (11) having one to three layers (15, 22, 24) including a primary breathable layer (15) (Fig. 2 and page 13, line 20 – page 14, line 2);

the primary breathable layer (15) including a mixture of filler particles (16) and a biodegradable thermoplastic polymer (12), and having voids (14) formed around the filler particles (16) to facilitate passage of water vapor (Fig. 2, page 14, lines 1-4, page 15, lines 9-15);

each of the layers including a biodegradable thermoplastic polymer (12) (Fig. 2, page 14, lines 1-5, page 15, lines- 2-8); and

a fibrous nonwoven web (40) continuously laminated face-to-face with the film (11) and including a biodegradable thermoplastic polymer (Figs. 3-4, page 17, lines 12-14, page 18, lines 2-3).

6. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

- A.** Claims 21-26, 31, 35, 38-40, 48, 49, 53, 54 and 56-58 stand rejected under 35 U.S.C. § 102(b) as anticipated by, or under 35 U.S.C. § 103(a) as obvious over U.S. Patent 5,171,308 (“Gallagher”) in view of U.S. Patent 4,698,372 (“Moss”).
- B.** Claims 41, 44-47 and 50-52 stand rejected under 35 U.S.C. § 103(a) as obvious over Gallagher in view of Moss and U.S. Patent 5,955,187 (“McCormack”).
- C.** Claims 42 and 43 stand rejected under 35 U.S.C. § 103(a) as obvious over Gallagher in view of Moss and U.S. Patent 5,139,687 (“Borger”) or U.S. Patent 5,968,404 (“Trinh”).
- D.** Claim 37 stands rejected under 35 U.S.C. § 103(a) as obvious over Gallagher in view of Moss and U.S. Patent 6,028,160 (“Chandler”).

7. ARGUMENT**A(1). The Anticipation Rejection Based On Gallagher In View Of Moss Is Improper As A Matter Of Law**

The Examiner rejected Claims 21-26, 31, 35, 38-40, 48, 49, 53, 54 and 56-58 under 35 U.S.C. § 102(b) as anticipated by, or alternatively under 35 U.S.C. § 103(a) as obvious over Gallagher in view of Moss. A claim is anticipated only if each and every element set forth in the claim is found, expressly or inherently, in a single prior art reference. See MPEP 2131 and cases cited therein. Because the Examiner required two references in combination to support this rejection, the rejection is improper as a matter of law, to the extent it relies on anticipation.

Notably, Gallagher refers to Moss at Col. 12, lines 45-48, but does not incorporate Moss by reference. The two patents are separate references. Accordingly, the rejection under 35 U.S.C. § 102(b) should be reversed.

A(2). The Obviousness Rejection Based On Gallagher In View Of Moss Should Be Reversed

The Examiner alternatively rejected the same claims (above) under 35 U.S.C. § 103(a) as obvious over Gallagher in view of Moss. This rejection is argued separately for Claims 21-26, 31, 35, 38-40, 48-49 and 54 (Group I) and Claim 53 and 56-58 (Group II). The claims in Group I specify the polymer types for the biodegradable thermoplastic polymers, whereas the claims in Group II do not.

i) The Rejection Of Claims 21-26, 31, 35, 38-40, 48-49 And 54 Under 35 U.S.C. § 103(a) Should Be Reversed

Independent Claim 21 (from which Claims 22-26, 31, 35, 38-40 and 48-49 depend) recites a breathable outer cover laminate including a breathable stretch-thinned barrier film and a fibrous nonwoven web continuously laminated face-to-face with the film. Each layer of the film, and the fibrous nonwoven web, includes a biodegradable thermoplastic polymer. The biodegradable thermoplastic polymers are selected from the group consisting of polylactic acid polymers; polyester terpolymers of butanediol, adipic

or succinic acid, and terephthalic acid; polycaprolactone polymers, and combinations thereof. Claim 54 (which depends from Claim 53) also requires these limitations.

Gallagher discloses “novel polyesters, fibers and films, nonwovens from the fibers and disposable products of the polyesters.” The polyesters are based on polyethylene terephthalate copolymerized with non-aromatic diacid, such as adipic and glutaric acids, and containing alkali metal or alkaline earth metal sulfo groups, such as a metal 5-sulfoisophthalic acid derivative (Abstract).

Gallagher focuses on use of the specific “novel polyesters” as described above. Furthermore, Gallagher explicitly teaches away from using other polyesters and polyester derivatives for these end uses:

Various polyester compositions have been suggested in the past for biodegradable end uses. These include polyhydroxybutyrate, polylactide, polycaprolactone, polyglycolide, and their copolymers. They have not been widely adopted in high volume uses, however, because they are either too expensive or their properties are inadequate for the uses mentioned above (Col. 2, lines 34-40).

A prior art reference must be considered in its entirety, including portions that teach away from the claimed invention. M.P.E.P. 2141.03; *Gore v. Garlock*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983). Because Gallagher explicitly teaches away from using the claimed biodegradable polymers in disposable product applications, a person of ordinary skill in the art would not have considered it obvious to use these polymers based on the disclosure of Gallagher.

Moss discloses copolymers and terpolymers of caprolactam (Col. 3, line 64 – Col. 4, line 2). However, Moss cannot be combined with Gallagher to arrive at the use of polycaprolactone polymers in the claimed breathable outer cover laminate. As explained above, Gallagher explicitly teaches away from using polycaprolactone and certain other polyester polymers. Gallagher cannot be modified in a way that contradicts its own explicit teaching, in order to arrive at Applicants’ claimed invention.

Gallagher places great emphasis on using specific polyester formulations including alkali metal or alkaline earth metal sulfano groups. The substitution of polymers proposed by the Examiner results from a) improper hindsight and b) improperly refusing to consider Gallagher in its entirety. Where Gallagher emphasizes the use of

specific polymers, and teaches away from other polymers (including polymers claimed by Applicants), it would not have been obvious to substitute Applicants' claimed polymers in the structure of Gallagher.

Moreover, Gallagher does not disclose a breathable outer cover laminate of a film and a nonwoven web, in which every film layer and the nonwoven web includes a biodegradable thermoplastic polymer as claimed. Although Gallagher discloses an outer cover laminate, the nonwoven layer of the laminate is formed of cotton, rayon or paper (Col. 11, lines 42-48). Moss also does not disclose a breathable outer cover laminate structure. Apparently, the disclosure of Moss includes only a single layer film.

Accordingly, the obviousness rejection of Claims 21-26, 31, 35, 38-40, 48-49 and 54 should be reversed.

ii) The Rejection Of Claims 53 And 56-58 Under 35 U.S.C. § 103(a) Should Be Reversed

The Examiner also rejected Claims 53 and 56-58 as obvious over Gallagher in view of Moss. These Group II claims differ from the Group I claims in that independent Claim 53 does not specify the type of biodegradable thermoplastic polymer. Claim 53 is directed to a breathable outer cover laminate in which each layer of a breathable film, and a fibrous nonwoven web, include a biodegradable thermoplastic polymer. The film contains filler particles and is stretch-thinned to facilitate passage of water vapor. The film and nonwoven web are continuously laminated face-to-face.

As explained above, Gallagher discloses an outer cover laminate including a film and a nonwoven web (Col. 11, lines 42-48). While the film is biodegradable, it is apparently not breathable. Instead, the specific film in the outer cover is made of "100% of the compostable composition" and is only described as "water-impermeable." Furthermore, the nonwoven web in the outer cover is made of cotton, rayon or paper. Such materials are not thermoplastic as claimed.

Again, the disclosure of Moss includes only a single-layer film. Neither Moss nor Gallagher, alone or combined, discloses a breathable outer cover laminate in which each layer of the film and the fibrous nonwoven web includes a biodegradable

thermoplastic polymer. Accordingly, the obviousness rejection of Claims 53 and 56-58 should be reversed.

B. The Obviousness Rejection Based On Gallagher In View Of Moss And McCormack Should Be Reversed

The Examiner rejected Claims 41, 44-47 and 50-52 under 35 U.S.C. § 103(a) as obvious over Gallagher in view of Moss and McCormack. This rejection is argued separately for Claims 41 and 44-47 (Group III) and Claims 50-52 (Group IV). The claims of Group III depend from Claim 21, discussed above. The claims of Group IV do not depend from Claim 21 and require two adjacent film layers to include a mixture of filler particles and biodegradable thermoplastic polymer.

i) The Rejection Of Claims 41 And 44-47 Under 35 U.S.C. § 103(a) Should Be Reversed

Claims 41 and 44-47 depend from Claim 21. These claims are patentable over the combination of Gallagher and Moss for at least the same reasons as Claim 21, explained in Section 7(A)(2)(ii) above. Specifically, Claim 21 requires each layer of the film, and the fibrous nonwoven web, to include a biodegradable thermoplastic polymer. The biodegradable thermoplastic polymers are selected from the group consisting of polylactic acid polymers, polyester terpolymers of butanediol, adipic or succinic acid, and terephthalic acid; polycaprolactone polymers, and combinations thereof.

As explained above, Gallagher discloses fibers, films, nonwovens and disposable products formed using “novel polyesters” which include polyethylene terephthalate copolymerized with non-aromatic acid, such as adipic and glutaric acids, and containing alkali metal or alkaline earth metal sulfo groups, such as a metal 5-sulfoisophthalic acid derivative (Abstract). As explained above, Gallagher explicitly teaches away from using other polyesters and polyester derivatives, including polymers recited in Applicants’ claims (Col. 2, lines 34-40). Moreover, Gallagher does not disclose a breathable outer cover laminate in which every film layer and the nonwoven web includes a biodegradable thermoplastic polymer. Moss does not supply the missing

disclosure, and cannot be combined with Gallagher for the purpose of disclosing polymers that are explicitly excluded by Gallagher.

McCormack does not supply the disclosure missing from Gallagher and Moss. McCormack does not disclose a breathable outer cover laminate in which each film layer and the nonwoven web includes a biodegradable thermoplastic polymer as recited in Claim 21. The matrix polymers disclosed in McCormack are not thermoplastic biodegradable polymers as claimed by Applicants (Col. 2, line 46 – Col. 3, line 30).

Accordingly, the obviousness rejection of Claims 41 and 44-47 should be reversed.

**ii) The Rejection Of Claims 50-52 Under 35 U.S.C. § 103(a)
Should Be Reversed**

Independent Claim 50 (from which Claims 51-52 depend) recites a breathable outer cover laminate including a breathable stretch-thinned barrier film having two or more layers, and a fibrous nonwoven web continuously laminated face-to-face with the film. Each layer of the film, and the fibrous nonwoven web, include a biodegradable thermoplastic polymer. Two of the film layers are adjacent and each includes a mixture of about 5-80% by weight filler particles and about 20-95% by weight biodegradable thermoplastic polymer, with voids formed around the filler particles. The biodegradable thermoplastic polymers are selected from the group consisting of polylactic acid polymers; polyester polymers of butanediol, adipic or succinic acid, and terephthalic acid; polycaprolactone polymers; and combinations thereof.

Gallagher discloses “novel polyesters, fibers and films, nonwovens from the fibers and disposable products of the polyesters.” The polyesters are based on polyethylene terephthalate copolymerized with non-aromatic diacid, such as adipic and glutaric acids, and containing alkali metal or alkaline earth metal sulfo groups, such as a metal 5-sulfoisophthalic and derivative (Abstract).

Gallagher focuses on use of the specific “novel polyesters” as described above. Furthermore, Gallagher explicitly teaches away from using other polyesters and polyester derivatives for these end uses:

Various polyester compositions have been suggested in the past for biodegradable end uses. These include polyhydroxybutyrate, polylactide,

polycaprolactone, polyglycolide, and their copolymers. They have not been widely adopted in high volume uses, however, because they are either too expensive or their properties are inadequate for the uses mentioned above (Col. 2, lines 34-40).

A prior art reference must be considered in its entirety, including portions that teach away from the claimed invention. M.P.E.P. 2141.03; *Gore v. Garlock*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983). Because Gallagher explicitly teaches away from using the claimed biodegradable polymers in disposable product applications, a person of ordinary skill in the art would not have considered it obvious to use these polymers based on the disclosure of Gallagher.

Moss discloses copolymers and terpolymers of caprolactam (Col. 3, line 64 – Col. 4, line 2). However, Moss cannot be combined with Gallagher to arrive at the use of polycaprolactone polymers in the claimed breathable outer cover laminate. As explained above, Gallagher explicitly teaches away from using polycaprolactone and certain other polymers. Gallagher cannot be modified in a way that contradicts its own explicit teaching, in order to arrive at Applicants' claimed invention.

Gallagher places great emphasis on using specific polyester formulations including alkali metal or alkaline earth metal sulfano groups. The substitution of polymers proposed by the Examiner results from a) improper hindsight and b) improperly refusing to consider Gallagher in its entirety. Where Gallagher emphasizes the use of specific polymers, and teaches away from other polymers (including polymers claimed by Applicants), it would not have been obvious to substitute Applicants' claimed polymers in the structure of Gallagher.

Moreover, Gallagher does not disclose a breathable outer cover laminate of a film and a nonwoven web, in which every film layer and the nonwoven web includes a biodegradable thermoplastic polymer as claimed. Although Gallagher discloses an outer cover laminate, the nonwoven layer of the laminate is formed of cotton, rayon or paper (Col. 11, lines 42-48). Moss also does not disclose a breathable outer cover laminate structure. Apparently, the disclosure of Moss includes only a single layer film.

Additionally, neither Gallagher nor Moss discloses the limitation of Claim 50 requiring two of the film layers "being adjacent and each including a mixture of

about 50-80% by weight filler particles and about 20-95% by weight of a biodegradable thermoplastic polymer, having voids formed around the filler particles.” Gallagher only discloses a microporous film with reference to Moss (Col. 12, lines 45-48). As explained above, Moss discloses only a single-layer film.

McCormack does not supply the disclosure missing from Gallagher and Moss. McCormack does not disclose a breathable outer cover laminate in which each film layer (or two adjacent film layers) and the nonwoven web includes a biodegradable thermoplastic polymer as recited in Claim 21. The matrix polymers disclosed in McCormack are not thermoplastic biodegradable polymers as claimed by Applicants (Col. 2, line 46 – Col. 3, line 30).

Accordingly, the obviousness rejection of Claims 50-52 should be reversed.

C. The Obviousness Rejection Based On Gallagher In View Of Moss And Borgher Or Trinh Should Be Reversed

The Examiner rejected Claims 42 and 43 under 35 U.S.C. § 103(a) as obvious over Gallagher in view of Moss, and either Borgher or Trinh.

Claims 42 and 43 depend from Claim 21. These claims are patentable over the combination of Gallagher and Moss for at least the same reasons as Claim 21, explained in Section 7(A)(2)(ii) above. Specifically, Claim 21 requires each layer of the film, and the fibrous nonwoven web, to include a biodegradable thermoplastic polymer. The biodegradable thermoplastic polymers are selected from the group consisting of polylactic acid polymers, polyester terpolymers of butanediol, adipic or succinic acid, and terephthalic acid; polycaprolactone polymers, and combinations thereof.

As explained above, Gallagher discloses fibers, films, nonwovens and disposable products formed using “novel polyesters” which include polyethylene terephthalate copolymerized with non-aromatic acid, such as adipic and glutaric acids, and containing alkali metal or alkaline earth metal sulfo groups, such as a metal 5-sulfoisophthalic acid derivative (Abstract). As explained above, Gallagher explicitly teaches away from using other polyesters and polyester derivatives, including polymers recited in Applicants’ claims (Col. 2, lines 34-40). Moreover, Gallagher does not disclose

a breathable outer cover laminate in which every film layer and the nonwoven web includes a biodegradable thermoplastic polymer. Moss does not supply the missing disclosure, and cannot be combined with Gallagher for the purpose of disclosing polymers that are explicitly excluded by Gallagher.

The Examiner cites Borgher or Trinh to allegedly suggest the use of cyclodextrin as a filler material in a breathable film as required by Claim 42 or 43. However, Borgher actually teaches the use of cyclodextrin/perfume complexes on a dryer sheet (Abstract). Trinh actually teaches the use of cyclodextrin in fabric wrinkle-control solutions (Abstract). The combination of these references clearly do not teach or suggest Applicants' use of cyclodextrin as a filler material embedded within a matrix of a biodegradable thermoplastic polymer film layer of a breathable outer cover laminate.

Furthermore, neither Borgher nor Trinh supplies the disclosure missing from Gallagher and Moss. Neither reference discloses a breathable outer cover laminate in which each film layer and the nonwoven web include a biodegradable thermoplastic polymer as recited in Claim 21. Moreover, Borgher and Trinh are directed to divergent fields of art, and there is no suggestion to combine them with Gallagher or Moss.

Accordingly, the obviousness rejection of Claims 42 and 43 should be reversed.

D. The Rejection Of Claim 37 Under 35 U.S.C. § 103(a) Should Be Reversed

The Examiner rejected Claim 37 under 35 U.S.C. § 103(a) as obvious over Gallagher in view of Moss and Chandler.

Claim 37 depends from Claim 21, and requires that the biodegradable thermoplastic polymer in each layer comprises a terpolymer of butanediol, terephthalic acid, and adipic acid. This claim is patentable over the combination of Gallagher and Moss for at least the same reasons as Claim 21, explained in Section 7(A)(2)(ii) above. Specifically, Claim 21 requires each layer of the film, and the fibrous nonwoven web, to include a biodegradable thermoplastic polymer. The biodegradable thermoplastic polymers are selected from the group consisting of polylactic acid polymers, polyester

terpolymers of butanediol, adipic or succinic acid, and terephthalic acid; polycaprolactone polymers, and combinations thereof.

As explained above, Gallagher discloses fibers, films, nonwovens and disposable products formed using “novel polyesters” which include polyethylene terephthalate copolymerized with non-aromatic acid, such as adipic and glutaric acids, and containing alkali metal or alkaline earth metal sulfo groups, such as a metal 5-sulfoisophthalic acid derivative (Abstract). As explained above, Gallagher explicitly teaches away from using other polyesters and polyester derivatives, including polymers recited in Applicants’ claims (Col. 2, lines 34-40). Moreover, Gallagher does not disclose a breathable outer cover laminate in which every film layer and the nonwoven web includes a biodegradable thermoplastic polymer. Moss does not supply the missing disclosure, and cannot be combined with Gallagher for the purpose of disclosing polymers that are explicitly excluded by Gallagher.

In the final Office Action, the Examiner stated:

Regarding Claim 37, Gallagher and Moss do not appear to disclose the claimed terpolymers of butanediol, terephthalic acid and adipic acid. However, functionally equivalent biodegradable film-forming materials, including the claimed terpolymer, are commercially available as prepared compositions. The Chandler reference discloses a functionally equivalent material, ECOFLEX[®] (Col. 2, lines 54-57), which is a biodegradable film-forming composition comprising a terpolymer of butanediol, adipic acid and terephthalic acid (12/8/06 final Office Action, pages 6-7).

However, the Examiner’s position that the claimed terpolymer is “functionally equivalent” to the polymers disclosed in Gallagher contradicts the teaching of Gallagher. Gallagher teaches that the polymers of polyethylene terephthalate copolymerized with a non-aromatic diacid, and containing alkali metal or alkaline earth metal sulfo groups, are superior to other polymers and therefore not functionally equivalent (Abstract and Col. 2, lines 34-40).

Moreover, Chandler does not supply the disclosure missing from Gallagher and Moss. Chandler does not disclose a breathable outer cover laminate in which each film layer and the nonwoven web include a biodegradable thermoplastic polymer as recited in Claim 21.

Accordingly, the obviousness rejection of Claim 37 should be reversed.

8. CONCLUSION

For the above reasons, Applicants respectfully submit that the claim rejections posed by the Examiner are improper as a matter of law and fact. Applicants respectfully request that the Board reverse the final rejections of Claims 21-26, 31, 35, 37-54 and 56-58.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Maxwell J. Petersen". The signature is fluid and cursive, with the first and last names being more prominent.

Maxwell J. Petersen
Registration No. 32,772

Pauley Petersen & Erickson
2800 West Higgins Road
Suite 365
Hoffman Estates, Illinois 60169
TEL (847) 490-1400
FAX (847) 490-1403

APPENDIX A (CLAIMS)

1-20. (Canceled)

21. (Rejected) A breathable outer cover laminate, comprising:
a breathable, stretch-thinned barrier film having one or more layers;
one of the layers including a mixture of filler particles and a biodegradable thermoplastic polymer, having voids formed around the filler particles to facilitate passage of water vapor through the film, and constituting 50-100 % of a thickness of the film;
each of the layers including a biodegradable thermoplastic polymer; and
a fibrous nonwoven web continuously laminated face-to-face with the film and including a biodegradable thermoplastic polymer;
wherein the biodegradable thermoplastic polymers are selected from the group consisting of polylactic acid polymers; polyester terpolymers of butanediol, adipic or succinic acid, and terephthalic acid; polycaprolactone polymers; and combinations thereof.

22. (Rejected) The breathable laminate of Claim 21, wherein the film and nonwoven web are adhesively bonded together.

23. (Rejected) The breathable laminate of Claim 21, wherein the film and nonwoven web are thermally bonded together.

24. (Rejected) The breathable laminate of Claim 21, wherein the nonwoven web comprises a spunbond web.

25. (Rejected) The breathable laminate of Claim 21, wherein the nonwoven web comprises a meltblown web.

26. (Rejected) The breathable laminate of Claim 21, wherein the nonwoven web comprises an air laid web.

27-30. (Canceled)

31. (Rejected) A personal care article comprising the breathable laminate of Claim 21.

32-34. (Canceled)

35. (Rejected) A medical article comprising the breathable laminate of Claim 21.

36. (Canceled)

37. (Rejected) The breathable laminate of Claim 21, wherein the biodegradable thermoplastic polymer in each film layer comprises a terpolymer of butanediol, terephthalic acid, and adipic acid.

38. (Rejected) The breathable laminate of Claim 21, wherein the filler particles comprise inorganic filler particles.

39. (Rejected) The breathable laminate of Claim 38, wherein the filler particles comprise calcium carbonate.

40. (Rejected) The breathable laminate of Claim 21, wherein the filler particles comprise organic filler particles.

41. (Rejected) The breathable laminate of Claim 21, wherein the filler particles comprise water-swellaable filler particles.

42. (Rejected) The breathable laminate of Claim 21, wherein the filler particles comprise biodegradable filler particles.

43. (Rejected) The breathable laminate of Claim 42, wherein the filler particles comprise a cyclodextrin.

44. (Rejected) The breathable laminate of Claim 21, wherein the one film layer comprises about 5-80% by weight of the filler particles and about 20-95% by weight of the biodegradable thermoplastic polymer.

45. (Rejected) The breathable laminate of Claim 21, wherein the one film layer comprises about 20-40% by weight of the filler particles and about 60-80% by weight of the biodegradable thermoplastic polymer.

46. (Rejected) The breathable laminate of Claim 21, wherein the one film layer comprises greater than 45% to about 80% by weight of the filler particles and about 20% to less than 55% by weight of the biodegradable thermoplastic polymer.

47. (Rejected) The breathable laminate of Claim 21, wherein the one film layer comprises about 50-65% by weight of the filler particles and about 35-50% by weight of the biodegradable thermoplastic polymer.

48. (Rejected) The breathable laminate of Claim 21, wherein the film has been uniaxially stretched.

49. (Rejected) The breathable laminate of Claim 21, wherein the film has been biaxially stretched.

50. (Rejected) A breathable outer cover laminate, comprising:
a breathable, stretch-thinned barrier film having two or more layers;
two of the layers being adjacent and each including a mixture of about 5-80% by weight filler particles and about 20-95% by weight of a biodegradable thermoplastic polymer, having voids formed around the filler particles, and together constituting 50-100% of a thickness of the film;

each of the layers including a biodegradable thermoplastic polymer; and
a fibrous nonwoven web continuously laminated face-to-face with the film
and including a biodegradable thermoplastic polymer;

wherein the biodegradable thermoplastic polymers are selected from the
group consisting of polylactic acid polymers; polyester terpolymers of butanediol, adipic or
succinic acid, and terephthalic acid; polycaprolactone polymers; and combinations thereof.

51. (Rejected) A personal care article comprising the breathable
laminate of Claim 50.

52. (Rejected) A medical article comprising the breathable laminate of
Claim 50.

53. (Rejected) A breathable outer cover laminate, comprising:
a breathable, stretch-thinned barrier film having one to three layers
including a primary breathable layer;

the primary breathable layer including a mixture of filler particles and a
biodegradable thermoplastic polymer, and having voids formed around the filler particles
to facilitate passage of water vapor;

each of the layers including a biodegradable thermoplastic polymer; and
a fibrous nonwoven web continuously laminated face-to-face with the film
and including a biodegradable thermoplastic polymer.

54. (Rejected) The breathable laminate of Claim 53, wherein the
biodegradable thermoplastic polymers are selected from the group consisting of polylactic
acid polymers; polyester terpolymers of butanediol, adipic or succinic acid, and
terephthalic acid; polycaprolactone polymers; and combinations thereof.

55. (Canceled)

56. (Rejected) The breathable laminate of Claim 53, wherein the film further comprises a skin layer including filler particles, and having voids formed around the filler particles to facilitate the passage of water vapor.

57. (Rejected) A personal care article comprising the breathable laminate of Claim 53.

58. (Rejected) A medical article comprising the breathable laminate of Claim 53.

59-60. (Canceled)

APPENDIX B (EVIDENCE)

No evidence is submitted pursuant to 37 C.F.R. §§ 1.130, 1.131 or 1.132. Copies of the following prior art relied upon by the Examiner are attached.

U.S. Patent 5,171,308 (“Gallagher”), entered in the final (ninth) Office Action dated 08 December 2006;

U.S. Patent 4,698,372 (“Moss”), entered in the final (ninth) Office Action dated 08 December 2006;

U.S. Patent 5,955,187 (“McCormack”), entered in the final (ninth) Office Action dated 08 December 2006;

U.S. Patent 5,139,687 (“Borgher”), entered in the final (ninth) Office Action dated 08 December 2006;

U.S. Patent 5,968,404 (“Trinh”), entered in the final (ninth) Office Action dated 08 December 2006; and

U.S. Patent 6,028,160 (“Chandler”), entered in the fifth Office Action dated 06 May 2005.

Serial No.: 10/036,106

Docket No.: KC-15,891

APPENDIX C (RELATED PROCEEDINGS)

There are no related proceedings.